Supreme Court U.S.
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No. 01-1114

In the

Supreme Court of the United States

DAVID WINTERS, *et al.*,

Appellants,

v.

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

Appellees.

On Direct Appeal From The Three-Judge Panel In The United States District Court For The Northern District of Illinois

MOTION TO AFFIRM

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2 *Moore's Federal Practice* §12.38,
at 12-102.1 (3d ed. 2001) 2

MOTION TO AFFIRM

Pursuant to Rule 18.6, Appellees Illinois State Board of Elections and its Executive Director Ronald D. Michaelson ("State Appellees") move to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision on the cause depends are so unsubstantial as to need no further argument. The decision entered on the merits below is based on well-settled law established by this Court, and there is no conflict which requires this Court's resolution.

STATEMENT OF FACTS

This case involves the constitutionality of the random selection procedure for breaking deadlocks on the Illinois Legislative Redistricting Commission, as provided for in section 3(b) of article IV of the Illinois Constitution of 1970. The provision under attack is set forth at pages 24a-25a of the Jurisdictional Statement. The trial court, per a three-judge panel, upheld the validity of the provision. Its opinion is set forth at pages 1a-14a of the Jurisdictional Statement.

The case was decided in the trial court pursuant to the State Appellees' and intervening defendants' motions for judgment on the pleadings. (Jurisdictional Statement 13a-14a.) The Appellants therefore base the underlying "facts" recited in their Jurisdictional Statement on the allegations set forth in their Amended Complaint. Essentially, the Amended Complaint alleges that the apportionment map for the election of Illinois legislators needs to be redrawn; that section 3(b) of article IV of the Illinois Constitution sets forth the procedure for redrawing the map; that the procedure contemplates that, first, the Illinois General Assembly attempt to redraw it, but

if it is not successful in doing so, then a Commission consisting of four Democrats and four Republicans be appointed to do so; and that if the equally-divided Commission is not able to agree on the new map, then a ninth member be randomly selected to break the deadlock. The Amended Complaint claims that the random selection of the ninth member is a violation of equal protection and due process rights.

Because factual allegations are typically accepted as true on a motion for judgment on the pleadings, the State Appellees do not quarrel with the facts described in the Jurisdictional Statement for purposes of this appeal. Even on such a motion, however, this Court need not ignore facts set forth in the Amended Complaint that undermine the Appellants' claim. *Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998); 2 *Moore's Federal Practice* §12.38, at 12-102.1 (3d ed. 2001).

One fact in particular undermines at least a portion of their claim. Based on their Amended Complaint, the Appellants state that, because of the equal number of Democrats and Republicans on the Commission prior to use of the random selection procedure, "the probability of a deadlock is very high—if not inevitable." (Jurisdictional Statement 5.) Elsewhere, however, they acknowledge that, on one of the four occasions on which the Commission has been convened since 1970, redistricting was accomplished by the Commission without the random selection of a ninth member. (Jurisdictional Statement 6-7n.2.)

Application of the random selection procedure on three out of four occasions hardly establishes that its use is "inevitable." To the contrary, such a result suggests that, at least a significant part of the time, the political parties

will negotiate their redistricting differences through an equally-divided Commission. The State Appellees thus believe that the facts of record in this appeal do not in any way show that random selection is doomed to fail in its purpose of encouraging the parties to compromise.

ARGUMENT

The Appellants purport to attack the constitutionality of the random selection procedure on Equal Protection Clause and Due Process Clause grounds. The insubstantiality of the questions they raise, however, is demonstrated by the fact that the specific arguments they advance are made in their Jurisdictional Statement for the first time. The Appellants therefore have waived the main bases for their appeal, and they fail to show why the three-judge panel's decision is in need of plenary review.

I. The Random Selection Procedure Comports with Equal Protection

The Appellants' opening constitutional argument in the trial court was that the random selection procedure violates the Equal Protection Clause because it results in disparate treatment for Republicans and Democrats. (*See* Winters Plaintiffs' and Philip Intervenors' Memorandum of Law In Support of Their Motion for Judgment on the Pleadings ("Appellants' Mem.") 10.) The trial court found that the argument was made "[i]n rather summary fashion" and that it had no merit because the procedure "treats both political parties exactly the same and singles neither party out for disparate treatment." (Jurisdictional Statement 13a.)

A. The Appellants Have Waived Their Equal Protection Argument Based on Strict Scrutiny

The Appellants now argue that the trial court erred because it was required, but failed, to apply a strict scrutiny standard in considering their Equal Protection Clause claim. (Jurisdictional Statement 9.) They contend that their claim involves the fundamental right to vote, that the highest level of constitutional scrutiny therefore applies, and that the provision must fall because it is not narrowly tailored to serve a compelling interest of the State. (Jurisdictional Statement 10-12.)

The Appellants make these points for the first time in this appeal. Indeed, in the trial court, the Appellants argued in favor of application of the rational basis test to their equal protection position. Their opening brief quoted *Wichmann v. Bd. of Trs. of S. Ill. Univ.*, 180 F.3d 791, 798-99 (7th Cir. 1999), *vac. and rem. on other grounds*, 528 U.S. 1111 (2000), for the following proposition: "Equal Protection has long been held to require all state classification of persons to have at least a *rational basis,* treating similarly all similarly situated individuals." (Appellants' Mem. 10 (emphasis added).) They also quoted *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920), for the following: "the classification *must be reasonable*, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relation to the object of the legislation,* so that all persons similarly circumstanced shall be treated alike." (Appellants' Mem. 11 (emphasis added).) Apart from these quotes, the Appellants did not address in their briefs the level of scrutiny to be applied.

Only after the issue was raised by the trial court at oral argument did the Appellants' attorney suggest, without citing authority, that "strict scrutiny does apply" to

his equal protection position. (Sept. 28, 2001 Trans. 21.) Such cursory treatment of an issue hardly preserves it for appeal. *Nutrasweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 786 (7th Cir. 2000) (argument not supported with a single case citation was not properly presented for review); *United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir. 1997) (matters not "squarely presented" in trial court, including constitutional claims, cannot be raised on appeal). Not having pressed their heightened scrutiny argument in the trial court, the Appellants are not entitled to pursue it here. *Heller v. Doe*, 509 U.S. 312, 318-19 (1993) (this Court would review equal protection claim under the rational basis test, where a heightened standard was not raised below).

The Appellants' failure to advance the argument in the trial court in a meaningful way, moreover, evidences its lack of substantiality. The Court should therefore dispose of the argument by summary affirmance.

B. The Trial Court Correctly Rejected the Equal Protection Clause Claim

There can be no substantial question, in any event, with respect to the correctness of the trial court's decision. The Appellants argue that the random selection procedure is not narrowly tailored to serve the State's compelling interest of assuring proper reapportionment. (Jurisdictional Statement 12.) They further argue that the procedure "guarantees that one political party and the members of that party will be excluded from the redistricting process" (Jurisdictional Statement 14), and that it therefore "treats similarly situated voters differently depending upon their political affiliation" (Jurisdictional Statement 15).

As for the "narrowly tailored" point, the trial court found that the purpose of the random selection procedure was, in the first instance, to serve as a catalyst for bipartisan cooperation during reapportionment. (Jurisdictional Statement 8a.) If cooperation fails and a deadlock is reached, the procedure obviously serves the secondary purpose of resolving the deadlock. While other approaches to accomplishing redistricting are clearly possible, the Appellants fail to articulate how the procedure could be more narrowly tailored to achieve the purposes of avoiding or resolving deadlocks. Their argument, at best, is a cursory one to which this Court should attach little weight when assessing the need for plenary review.

With respect to the supposed disparate treatment accorded voters based on their political party, the trial court found just the opposite. As noted above, it found that the random selection procedure treats both parties "exactly the same." The court went on:

> The two candidates chosen by the Supreme Court to be used in the drawing may not be of the same political party and each candidate's name is thrown into the hat only once, so each party stands an equal chance of winning (or losing) the drawing. As a result, the tie-breaking provision does not fall disproportionately on any discrete political party or otherwise afford unequal treatment to different political parties.

(Jurisdictional Statement 13a.) Indeed, the court cited two cases in the election context—*Weisberg v. Powell*, 417 F.2d 388, 394 (7th Cir. 1969), and *Mann v. Powell*, 333 F.Supp. 1261, 1267 (N.D. Ill. 1969)—where the courts required selection by lot to *avoid* equal protection violations. *See also Campbell v. Board of Education*, 310 F.

Supp. 94, 103 (E.D.N.Y. 1970) ("fact that an element of chance is incorporated into a method of election is not necessarily violative of the Equal Protection Clause").

Nor does the random selection procedure "guarantee" that one political party will be able to take advantage of the other. The Illinois Constitution's redistricting provisions (Jurisdictional Statement 24a-25a) provide for a multiple-phased redistricting process. The responsibility for drawing the new map is given first to the General Assembly and then to an eight-person Commission. The purpose of the random selection provision is to encourage these entities to draw the new map, not by chance, but by agreement. The random selection provision becomes necessary only if the agreement approach fails.

Even if the random selection procedure is used, moreover, it does not guarantee that one political party will be excluded from the process. It guarantees only that the Commission will be able to move past a deadlock and complete its work. The Commission members are still fully capable of being fair and engaging in a reasoned deliberation.

Finally, even if the redistricted map ends up "unfairly" favoring one political party, it does not do so as the result of chance. Rather, it does so as the result of, first, the inability of the members of the General Assembly and then an equally divided Commission to come to an agreement, and, second, the failure of the majority-party members on the Commission to give adequate consideration to the views of the minority-party members. This is a problem that may be addressed by the courts after the new map is submitted. *See, e.g., Hastert v. State Board of Elections*, 777 F.Supp. 634 (N.D. Ill. 1991) (addressing claims of unfairness in new congressional redistricting plans). It is not resolved by attacking the map-drawing

process, any more than unconstitutional legislation passed by Congress gives rise to an attack on the process by which members of Congress are elected.

II. The Random Selection Procedure Comports With Due Process

The Appellants also raised a due process argument in the trial court, but characterized it as procedural due process, not substantive. (*See* Winters Plaintiffs' and Philip Intervenors' Reply Brief In Support of Their Motion for Judgment on the Pleadings ("Appellants' Reply") 3-4.) The trial court rejected the argument as "a non-issue" (Jurisdictional Statement 13a), and the Appellants do not even raise it here. The trial court nevertheless addressed substantive due process and determined that the random selection procedure passed muster under the rational basis test. (Jurisdictional Statement 5a-12a.)

A. The Appellants Have Waived Their Substantive Due Process Argument Based on Strict Scrutiny

Although the Appellants' Jurisdictional Statement raises substantive due process and argues in favor of strict scrutiny, their trial court briefs were wholly silent on these matters. The Appellants' opening brief in the trial court claimed a due process violation, but it did not characterize the violation as substantive or procedural. (Appellants' Mem. 12-15.) The Appellants supported their position largely with State case law which similarly did not distinguish between substantive and procedural violations. In addition, neither the Appellants nor their case law addressed the severity of the burden—high or low scrutiny—and neither purported to apply a federal law

analysis. (*See* Defendants' Response to Other Parties' Motions for Judgment on the Pleadings 4-6.) The State Appellees guessed that the Appellants were arguing substantive, not procedural, due process and responded accordingly.

In their trial court reply, responding to the State Appellees' substantive due process arguments, the Appellants attempted to clarify their position. Citing *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981), a procedural due process case, the Appellants asserted that they were alleging that the random selection provision "is a violation of procedural due process." (Appellants' Reply 3-4.) The Appellants' attorney maintained that position at oral argument. (Sept. 28, 2001 Trans. 12 (referring to "process that is due"), 21 (referring to the "procedural due process argument").) Even when pressed on whether he was conceding that there was no substantive due process violation, the attorney responded in the negative but explained that his argument would be "properly described" as a "procedural due process challenge." (*Id.* at 23.) At no time did the Appellants argue that a strict scrutiny analysis should apply to their due process claim.

Just as with their equal protection claim, by not pursuing their substantive due process/strict scrutiny argument in the trial court, the Appellants have waived it. *Santos v. Nansay Micronesia, Inc.*, 76 F.3d 299, 301 (7th Cir. 1996) (appellant waived substantive due process issues by not properly raising them in lower court). They have thus effectively waived all of the arguments made in their Jurisdictional Statement.

B. The Trial Court Correctly Rejected the Substantive Due Process Claim

As with the equal protection argument, there can be little question that the trial court properly disposed of whatever substantive due process claim was before it.

The court began by noting that "[a]ll the parties seem to agree some form of rational basis review is appropriate." (Jurisdictional Statement 5a.) This was because no one, not even the Appellants, argued in favor of some other level of review.

The trial court went on to suggest that one possible way to approach due process was under *Burdick v. Takushi*, 504 U.S. 428 (1992), where this Court upheld the validity of Hawaii's prohibition on write-in voting. (Jurisdictional Statement 5a-6a.) Under *Burdick*, a court is to assess an election law's burden on constitutional rights. If the burden is a high one, then a high level of scrutiny applies; if a low one, then the rational basis test applies. 504 U.S. at 433. The State Appellees argued in favor of applying *Burdick's* rational basis approach to uphold the random selection provision.

The trial court, however, decided to apply this Court's "more generic substantive due process analysis," which it said "point[ed] to a rational basis test." (Jurisdictional Statement 6a.) It proceeded to frame the level-of-scrutiny issue as whether a fundamental right exists "to have the tie-breaking member of a redistricting commission chosen by some means other than by lot." (Jurisdictional Statement 7a.) Because there is not, the court applied the rational basis test and found that the random selection provision is rationally related to its purposes of avoiding deadlocks and furthering the reapportionment process. (Jurisdictional Statement 9a-12a.)

The trial court's analysis is straightforward and unremarkable. It is consistent, moreover, with *Burdick* and with the many cases in which this Court has recognized that the primary responsibility for reapportionment lies with the States. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995); *Growe v. Emison*, 507 U.S. 25, 33-34 (1993). The Appellants cite no cases inconsistent with the trial court's decision. No purpose would therefore be served by full briefing and argument.

CONCLUSION

For the foregoing reasons, the judgment below upholding the random selection procedure for breaking deadlocks on the Illinois Legislative Redistricting Commission should be affirmed.

Dated: March 1, 2002

Respectfully submitted,

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